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EX PARTE OR LATE FILED

Howard J. Symons

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May 21, 1996

Mr. William Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Re: Ex Parte Presentation -- CS Docket No. 96-46
Tele-Communications, Inc.

Dear Mr. Caton:

On behalf of Tele-Communications, Inc., I met today with Christopher Wright and Aliza Katz of the General Counsel's office to discuss the attached paper. I also provided each of them with a copy of the paper.

Sincerely,



Howard J. Symons

Enclosure

cc: Christopher Wright
Aliza Katz

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TERMINATING GRANDFATHERED VDT SYSTEMS

Terminating Grandfathered VDT Systems

Upon adoption of open video system ("OVS") rules, operators of grandfathered video dialtone ("VDT") systems must terminate those systems and obtain either an OVS certification or a cable franchise. The urgent need for this clarification is illustrated by the situation that TCI faces in San Jose, California, where Pacific Telesis Group ("Pacific") continues to add capacity and subscribers to an unauthorized VDT system while it awaits a cable franchise from the city.^{1/}

Having determined to abandon video dialtone, Pacific should not be permitted to use the pendency of its franchise request as an excuse to continue operating under a superseded regulatory regime. Congress certainly did not assume that VDT systems would operate outside of Federal or local control, as is the case in San Jose.

The OVS rulemaking offers the Commission an opportunity to clarify the grandfathering of VDT systems and, in so doing, address the situation in San Jose. Specifically, TCI respectfully requests that the Commission make clear that any residual video dialtone systems must be terminated upon the FCC's adoption of open video system regulation. Pacific (and any other operator of a residual VDT system) should be barred from constructing additional capacity or adding new subscribers until it has obtained a franchise or an OVS certification.

^{1/} In July 1995, the FCC granted Pacific's request to provide commercial video dialtone service in selected areas of California, including San Jose. Pacific later filed, and then subsequently withdrew, its proposed channel reservation tariff. The proposed tariff addressed certain rates, terms, and conditions governing its provision of video dialtone service.

Although Pacific withdrew its proposed tariff, it constructed a video dialtone system and it is currently offering video dialtone service to approximately 1,000 San Jose homes without charge. Pacific representatives have called their offering a "limited technology trial" designed to test operating systems and business processes. Other than providing letters to the Commission stating its intention to proceed with a trial rather than the originally-proposed commercial offering, however, Pacific has neither received Section 214 approval to proceed with this video dialtone trial nor has it filed an associated tariff. On May 1, 1996, Pacific Bell Video Services ("PBVS"), a subsidiary of Pacific, filed a franchise application to provide cable television services in the City of San Jose, including the area already served by Pacific's technical video dialtone trial.

Even though it is currently receiving no revenues from the provision of VDT in San Jose, Pacific is even giving away a 13-inch color television set to every household that agrees to take the video dialtone service and paying the city \$3 per month in lieu of franchise fees for each VDT subscriber. TCI believes that these actions raise serious questions of cross-subsidy and cost allocation in connection with the offering.

FCC Authority

The Telecommunications Act of 1996 ("1996 Act")^{2/} repealed the video dialtone regulations and policies issued in CC Docket 87-266, but did not "require the termination of any video-dialtone system that the Commission has approved prior to the enactment of [the 1996] Act."^{3/} The latter provision was transitional: Congress did not intend to disrupt service being provided over video dialtone systems that had been approved prior to enactment. This provision clearly does not permanently grandfather these systems, however. Rather, it is a rule of statutory construction designed to prevent the repeal of the video dialtone rules from automatically triggering termination of these systems. The Commission, which created video dialtone without any specific statutory authority, retains the authority to phase out VDT when it adopts the rules to implement OVS.^{4/}

While Pacific may have a desire to continue to provide its video services to customers in San Jose, it should not be permitted to do so without legitimate Commission or city authorization. Terminating the residual VDT systems upon adoption of the OVS rules is far preferable to maintaining a few isolated examples of video dialtone, and is consistent with Congress's desire to establish a new regulatory structure to replace VDT.^{5/}

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^{2/} Pub. L. No. 104-104, 110 Stat. 56 (Feb. 8, 1996).

^{3/} 1996 Act, § 302(b).

^{4/} As the Conference Report notes: "Repeal of the Commission's video dialtone regulations is not intended to alter the status of any video dialtone service offered before the regulations required by [section 302] become effective." H.R. Rep. No. 458, 104th Cong. 2d Sess. 179 (1996) (emphasis added). Once OVS rules are adopted, the Commission must require the grandfathered VDT systems to conform to those rules or to one of the other statutory options available to telephone companies that wish to provide video programming to subscribers. See 47 U.S.C. § 571(a). Those options -- which do not include video dialtone -- "specifically address[] the regulatory treatment of video programming services provided by telephone companies." Conference Report at 171-72.

^{5/} In addition to repealing the video dialtone regulations and policies, Congress eliminated such hallmarks of the VDT framework as prior approval of construction under Section 214, 47 U.S.C. § 651(c), and other regulation under Title II, 47 U.S.C. § 573(c)(3).